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In The Supreme Court of The United States

OCTOBER TERM, 1955

No. 336

CHARLES STACEY and WILLIAM WINSLOW,
Appellants,

vs.

THEODORE PAPPAS,
Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

JURISDICTIONAL STATEMENT

SIDNEY W. WERNICK,
85 Exchange Street,
Portland, Maine,
Attorney for Appellants.

Marks Printing House, Portland, Me.

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In The Supreme Court of The United States

OCTOBER TERM, 1955

CHARLES STACEY and WILLIAM WINSLOW
Appellants

vs.

THEODORE PAPPAS
Appellee

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Judicial Court of the State of Maine sitting as a Law Court, entered on the thirty-first day of May, 1955. The said judgment:

(1) dismissed the appeal of appellants, taken from the decree of a single Justice of the Supreme Judicial Court sitting at nisi prius in equity, which decree ordered a permanent injunction to issue against peaceful picketing directed to other workers, for organizational purposes, conducted by appellants at the appellee's place of business; and

(2) affirmed said decree of injunction.

(Record, pp. 28 and 41)

Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion of the Supreme Judicial Court of the State of Maine sitting as a Law Court, is not yet reported. The opinion of the single Justice of the Supreme Judicial Court is not reported. Copies of the opinion of the Supreme Judicial Court sitting as a Law Court, and of its judgment, and copies of the decree of the single Justice which was affirmed by the Supreme Judicial Court sitting as a Law Court, and of the writ of injunction issued pursuant to said decree, are attached hereto as *Appendix A*.

Jurisdiction

This suit was brought in equity before a single Justice of the Supreme Judicial Court of the State of Maine. The decision of said Justice ordered a permanent injunction to issue against peaceful picketing conducted by appellants at appellee's place of business. An appeal was taken by appellants to the Supreme Judical Court of the State of Maine sitting as a Law Court. The judgment of said court was entered on May 31, 1955. Notice of appeal to the Supreme Court of the United States was filed in said Supreme Judicial Court on June 29, 1955. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257 (2), in that there is drawn in question the validity of a statute of the State of Maine, (to wit, Chapter 30, Section 15, Revised Statutes of Maine, 1954), on the ground of its being repugnant to the 14th Amendment (embracing the First Amendment) of the Constitution of the United States, and the decision of the Supreme Judicial Court of Maine sitting as a Law Court is in favor of the validity of the statute. The following decision sustains the jurisdiction of the Supreme Court of the United States to review the judgment on direct appeal in this case:

Dahnke-Walker Milling Company vs. *Bondurant*, 257 U. S. 282 (1921).

Questions Presented

A. Is the Maine statute, Chapter 30, Section 15, Revised Statutes of Maine, 1954, (which provides that:

> "Workers shall have full freedom of association, self-organization and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection, free from interference, restraint or coercion by their employers or other persons . . ."

invalid—as violative of the Fourteenth Amendment (embracing the First Amendment) of the United States Constitution, guaranteeing freedom of speech against state abridgment,—when said Maine statute is held, and applied, to illegalize peaceful picketing solely because, and regardless of any other circumstances:

(1) said peaceful picketing is conducted at the place of business of a restaurant and eating establishment by officials of a local labor union of hotel and restaurant employees; and

(2) the only purpose of said peaceful picketing is to organize employees of the said restaurant—the picketing being thereby directed, in terms, to the inducement of non-union employees of the restaurant to join the union?

B. Is the Maine statute, Chapter 30, Section 15, Revised Statutes of Maine, 1954, (which provides that:

> "Workers shall have full freedom of association, self-organization and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection, free from interference, restraint or coercion by their employers or other persons . . ."

invalid—as violative of the Fourteenth Amendment (embracing the First Amendment) of the United States Constitution, guaranteeing freedom of speech against state abridgment,—

when said Maine statute is held, and applied, to illegalize peaceful picketing by virtue of the circumstances that:

(1) said picketing is being conducted by officials of a local labor union of hotel and restaurant employees, at the place of business of a restaurant and eating establishment; and

(2) said picketing seeks, as its sole purpose, to organize employees of the restaurant—being thereby directed, in terms, to the inducement of non-union employees of the restaurant to join the union; and

(3) at least three employees of the restaurant who are participating in, and approving, the picketing are on strike?

Statutes Involved

This case involves Chapter 30, Section 15 of the Revised Statutes of Maine, 1954, to be found in Volume I, at Page 613 of the said Revised Statutes. The said statute reads as follows:

> "Workers shall have full freedom of association, self-organization and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection, free from interference, restraint or coercion by their employers or other persons . . ."

Statement of the Case

The appellee, who runs a restaurant or eating establishment known as Theodore's Lobster House, in the City of Portland, Maine, instituted a proceeding in equity in the Supreme Judicial Court of Maine against the Appellants, officials of Local No. 390, Hotel and Restaurant Employees and Bartenders International Union, seeking a permanent injunction against peaceful picketing. The case was heard on the

appellee's (Plaintiff's) bill, the answer of appellants (Defendants), the replication of the appellee (Plaintiff) and an Agreed Statement of Facts.

The complete Agreed Statement of Facts reads as follows:

"1. (That) the said Plaintiff is the operator and owner of a certain restaurant or eating establishment known as and called Theodore's Lobster House, located at 123 Commercial Street in said Portland.

"2. (That) the said Defendants and their agents and servants have been and are conducting picketing at the place of business of your Plaintiff.

"3. The said picketing has been at all times peaceful picketing.

"4. At least three employees of the Plaintiff are on strike, two of whom have been participating in the picketing and the third of whom has been present at the site of the picketing. All three are members of the union, Local No. 390 of the Hotel and Restaurant Employees and Bartenders International Union.

"5. The Defendants and the three employees aforesaid who are on strike have been conducting the picketing for the sole purpose of seeking to organize other employees of the Plaintiff, ultimately to have the Plaintiff enter into collective bargaining and negotiations with the Union, this being done as a preliminary for attempting to organize restaurant employees in other establishments throughout the State of Maine.

"6. The Plaintiff employs on an average thirty persons who would properly be subject to organization and of this thirty at least five are sporadic or transient employees.

"7. The business of the Plaintiff is a lawful business and if the picketing is illegal, the Plaintiff has been suffering and will continue to suffer damage in the conduct of his business which is irreparable and for which there is no adequate remedy at law."

A single Justice of the Supreme Judicial Court, presiding

at nisi prius, decreed that a permanent injunction should issue, as follows:

> "The Defendants, Charles Stacey and William Winslow, officials of Local No. 390, Hotel and Restaurant Employees and Bartenders International Union, their agents, employees and servants should be permanently enjoined from conducting and carrying on peaceful picketing at the place of business of the Plaintiff, located at 123 Commercial Street, Portland.
>
> Permanent injunction to issue."

(Record, pp. 14 and 15)

The appellants appealed from said decree to the Supreme Judicial Court sitting as a Law Court. Said Court rendered its decision and judgment on May 31, 1955, dismissing the appeal and affirming the decree at nisi prius.

In their responsive pleading to appellee's bill in equity, to wit: in their answer to said bill, the appellants had raised the Constitutional questions here involved by asserting:

> "Further answering, the Defendants say that, under the circumstances here involved the picketing activity being conducted at the Plaintiff's place of business is an exercise of the right of freedom of speech which is constitutionally protected against infringement by the state, under the 14th Amendment of the Constitution of the United States; that, by virtue of the Federal Constitution, and in particular the 14th Amendment thereof, this Court may not declare such picketing illegal and may not issue an injunction to restrain the picketing activity being conducted at the Plaintiff's place of business; that the issuance of any such injunction is a violation of the Constitution of the United States and, in particular, the 14th Amendment thereof."

(Record, pp. 7 and 8)

The Constitutional issues were raised by brief and argument in The Supreme Judicial Court sitting as a Law Court. That Court recognized that the issue of the Federal Constitutional guarantee of free speech was directly involved in the case and explicitly decided such issue. The Court, in its opinion, stated:

"There are, in our view, two issues: (1) Does the law of Maine prohibit peaceful picketing for organizational purposes under the circumstances of this case? (2) If so, is such picketing protected under the 'free speech' provision of the Federal Constitution?"

(Record, p. 17) (Appendix A, p. 24)

The Maine Court then held, after analyzing opinions of this court:

"The 1941 statute, *supra,* [to wit, now Revised Statutes of Maine, 1954, Chapter 30, Section 15] is a solemn declaration of the public policy of our state. It is the law, duly enacted by the legislature, which must govern the decision of this case. Within the plain and clear meaning and intent of this statute we find, as we have indicated, a public policy against peaceful picketing at the place of business for organizational purposes. In our opinion, the restraint of such picketing does not abridge the right of free speech under the decisions of the Supreme Court.
There is no error in the issuance of the injunction."

(Record, p. 27) (Appendix A, p. 33)

THE QUESTIONS ARE SUBSTANTIAL

This appeal raises substantial issues regarding the protection afforded by the 14th amendment against State infringement of the exercise of free speech as embodied in peaceful picketing. While the questions raised have not heretofore been explicitly decided, this court has developed a substantial body of doctrine relating to the issues. It is appellants' position that the decision and judgment appealed from reveal misinterpretations of the principles of law previously established. The highest court of the State of Maine has misconceived and distorted the decisions of this court, particularly as promulgated in:

Building Service Employees International Union vs. *Gazzam,* 339 U. S. 532 (1950).

and

Local No. 10 United Association of Journeymen Plumbers vs. *Graham,* 345 U. S. 192 (1953).

to reach conclusions which, we maintain, could not have been intended by this court. If the errors are permitted to persist, substantial interests of all organized labor in the various states and of the persons dealing with organized labor, as well as of the persons dependent upon the members of organized labor, are likely to be seriously prejudiced. Furthermore, a precedent will have been tolerated which will provide the green light to any state court so inclined to ignore, or circumvent, the constitutional protection of peaceful picketing as an exercise of the right to speak freely, and to return to the conception previously developed by state courts that peaceful picketing, because it tends to cause economic loss, is prima facie tortious. It is thus of importance that the issues here raised be decided, at this time, by the Supreme Court of the United States.

I

The Supreme Judicial Court of Maine sitting as a Law Court, has decided in the case at bar: (1) that peaceful picketing conducted by appellants, officials of a labor union, directed to other workers at their place of employment, and the sole objective of which is to induce the employees to join appellants' union, is illegalized under Chapter 30, Sec. 15, R. S. of Maine, 1954, as "interference, restraint or coercion;" and (2) that the said statute, as thus construed and applied, does not abridge the right of free speech guaranteed by the Fourteenth Amendment of the Constitution of the United States (to the extent that it embraces the First Amendment).

In the Maine Court's own language, the decision is stated as follows:

> "We direct our decision to the case of picketing solely for organizational purposes. We need not, nor do we, pass upon the lawfulness of a strike or picketing for other purposes."
>
> (Record, p. 24) (Appendix A, p. 30)

Picketing for "organizational purposes" is recognized by the

court to mean "action directed in terms to the persuasion of non-union employees to join a union."

(Record, p. 21) (Appendix A, p. 28)

The Maine Court concludes:

> "Within the plain and clear meaning and intent of the statute we find, as we have indicated, a public policy against peaceful picketing at the place of business for organizational purposes. In our opinion the restraint of such picketing does not abridge the right of free speech under the decisions of the Supreme Court."

(Record, p. 27) (Appendix A, p. 33)

The decision of the Maine Court of last resort is rested upon a single foundational factor — *that picketing, even though peaceful, imposes economic damage upon the business enterprise which employs the employees at whom the picketing is directed.* Because the peaceful picketing here involved produces such economic loss, thereby indirectly causing economic damage to the employees themselves—the picketing, *ipso facto,* is held to constitute "interference, restraint or coercion" within the proscription of Chap. 30, Sec. 15, R. S. of Maine, 1954.

The analysis is summarized in the Maine Court's own language:

> "The employee cannot escape a share of the irreparable damage admittedly caused to the business on which his livelihood depends. Irreparable damage to employer must in any appreciable period be like damage to the employee. The defendants say in substance to the twenty-seven non-union workers 'Join with us or we will continue to harm the business in which you are employed.'
>
> "The picketing is at least an act of interference with the employee in the exercise of his personal rights. It violates the language and the purpose of the statute, supra, and it is unlawful."

(Record, p. 22) (Appendix A, p. 29)

It is to be emphasized that in this analysis the Maine Court holds that the peaceful picketing constitutes "interference, restraint or coercion," outlawed directly by the statute, even though the objective of the picketing—to have employees join a union—is in no manner declared to be itself illegal or improper under the state's public policy.

The Maine Court's decision is an abridgment of the constitutional guarantee afforded peaceful picketing as a mode of free communication. The court's construction and application of the Maine statute invalidate it as a violation of the 14th Amendment, according to all doctrine and indicia established by the decisions of this court. If, as here,—solely because it causes economic damage to the employees at whom it is directed—peaceful picketing, regardless of any other circumstances and, in particular, regardless of the legality or propriety of its objective, may be constitutionally held by the State of Maine to be "interference, restraint or coercion," there results a contradiction of the principle definitively established by this court in

Thornhill vs. *Alabama,* 310 U. S. 88 (1940)

and never repudiated,—that the injury to a particular person's business effected by the public's response to peaceful picketing may not, constitutionally, be the basis for justifying a restraint of the element of free expression inhering in peaceful picketing.

This court has never sustained a decision, such as the instant one, which outlaws peaceful picketing and the element of free communication embodied within peaceful picketing, solely on the ground that the picketing is causing economic damage to certain persons, and regardless of any other circumstances pertaining either to the manner in which the picketing is being conducted or to the propriety of the purpose of the picketing.

The square issue of the present case is, therefore, of crucial importance at this time. The question of the validity of the

Maine statute, as herein construed and applied, should be decided by this court. Unless this court now decides the matter, whatever vitality has been infused into the constitutional protection afforded the "ingredient of communication" in peaceful picketing will have been permitted, by default, to be annihilated.

II

The Maine Court seizes upon the solitary fact that peaceful picketing causes economic loss to the business of the employer to assert an additional ground for the illegality of peaceful picketing by appellants directed to other workers at their place of employment, to induce them to join appellants' union. The court says that although such peaceful picketing may be "action directed in terms to the persuasion of non-union employees to join a union," it simultaneously affects the employer by subjecting him to irreparable loss. From this fact alone, of irreparable loss to the employer, the Maine Court concludes that all organizational picketing by workers of other workers which is conducted at the place of employment must be deemed, in legal contemplation, to be identified, or equated, with peaceful picketing aimed at the unlawful purpose of seeking to have the employer coerce his employees into joining a union. In the court's own language, the proposition is stated as follows:

> "A coercive force is generated by the picketing to secure new members for the union. It is apparent that this force is applied to the employer to urge his employees to join the union to save his business * * *
>
> "In reaching for the employees, there is a steady and exacting pressure upon the employer to interfere with the free choice of the employees in the matter of organization. To say that the picketing is not designed to bring about such action is to forget an obvious purpose of picketing—to cause economic loss to the business during non-compliance by the employees with the requests of the union."
>
> **(Record, p. 21) (Appendix A, p. 28)**

Even though the Agreed Statement of Fact carefully confines the purpose of the picketing *solely* to the organizing of employees, the Maine Court purports to add other "purposes," in contradiction of the Agreed Statement of Fact, *and without evidence thereof,* by resort to words such as "apparent" and "obvious." The true import of this approach is that the court has obliterated, as a legal reality, strict organizational picketing—picketing by workers of other workers, at their place of employment, directed in terms to inducing such employees to join a union. The Maine Court holds that because such picketing causes irreparable loss to the employer, that fact alone suffices, *necessarily,* to transform all organizational picketing at an employer's premises into picketing aimed at the illegal objective of seeking to have the employer coerce his employees into joining the union.

Such decision by the Maine Court explicitly and deliberately enters the domain carefully excluded from the decision in

> *Building Service Employees International Union* vs. *Gazzam,* 339 U. S. 532 (1950)

and there reserved. This Court said in *Gazzam*:

> "The construction of the statute which we are reviewing prohibits coercion of workers by employers. * * * There is no contention that *picketing directed at employees for organization purposes would be violative of that policy.* The decree does not have that effect." (italics ours) (pp. 539-540).

Here, however, the Maine Court has decided precisely that "picketing directed at employees for organization purposes" is legally identical with picketing which seeks to coerce the employer into coercing his employees in their choice of bargaining representative, and thus, *ipso facto,* offends the public policy of the state which prohibits such coercion of workers by employers. The decision is reached on a basis which dispenses with the need for evidence or agreed facts to support a conclusion that a purpose to have the employer coerce his employees in their choice of bargaining representative is, *in fact,* the calculated or sought-after objective of the picketers.

The decision by the Maine Court is a "mutilation" of the right of free expression. It restrains the communication of ideas by workers in relation to other workers *solely and entirely* on the basis of the impact that such free expression will have on the employer's economic interests.

Thornhill vs. *Alabama*, 310 U. S. 88 (1940),

fifteen years ago, established that such restraint of peaceful picketing is unconstitutional as violative of the due process clause, embracing the First Amendment. Likewise, in

A.F.L. vs. *Swing*, 312 U. S. 321 (1941)

this court said:

> "Communication by employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in *Thornhill's* case." (p. 326).

It may be added that this court has never sanctioned an injunction against peaceful picketing, based upon the impropriety of the purpose of the picketing, unless: (1) the alleged improper objective was shown, *in fact*, to be the actually calculated or sought-after result of the picketing and (2) such fact was established by evidence additional to the inference, alone, of the reasonable foreseeability of specific conduct as a method of avoiding economic loss.

These two requirements will be recognized as operative in every case in which this court has sustained an injunction against peaceful picketing aimed at a purpose justifiably regarded as illegal or contrary to a state's public policy. In

Giboney vs. *Empire Storage & Ice Co.*, 336 U. S. 490 (1949)

what was found to be the illegal purpose of the picketing was actually "avowed" by the picketers. Independently of the picketing itself or of its potential consequences, other evidence existed proving overwhelmingly that demands had been made upon the wholesale ice distributor to sign the agreement which constituted a felony under Missouri law. Indeed,

the failure to sign such criminal agreement was the only complaint registered with the company; it was the very complaint which was expressly stated on the placards of the pickets. The execution of the felonious agreement was further shown to be the calculated aim of the picketing by the fact that agreements in restraint of trade had been obtained from all other wholesale ice distributors except the Plaintiff.

In

Hughes vs. *Superior Court of Costa County,* 339 U. S. 460 (1950)

the situation was the same as in *Giboney.* An abundance of evidence, in addition to the picketing itself and any potential consequence of the picketing within the range of reasonable apprehension, established that the picketers had avowed their objective to be employment discrimination based on race or color alone. The placards of the pickets so stated; such demands had been made on the employer,—the picketing having started after he refused to comply with the demands.

Likewise, in

I.B.T. Local 309 vs. *Hanke,* 339 U. S. 470 (1950)

there was no question that the activity found contrary to the state's public policy had been avowed by the pickets to be their objective. Over and above the picketing itself and what might be reasonably foreseen as potential action which could be induced by it, there was much independent evidence to assist in proof of the actual and specific objective of the picketing. Union representatives had called upon the Hankes to urge them to respect the limitation on business powers in the agreement or give up their union shop card. The picketing was begun after the Hankes had surrendered the union shop card. The placards of the picketers specifically referred to the "union shop card" as the issue involved.

In

Building Service Employees International Union vs. *Gazzam,* 339 U. S. 532 (1950)

representatives of the union had met with the employer several times, persisting in demands that he sign a closed shop agreement or, at least, by subsequent modification, a maintenance of membership agreement. As this court said:

> "With the exception of refusing to sign the contract requiring his employees to join the union, Respondent had complied with all the requests and demands of the union. That single refusal was what caused the union to brand Respondent's place of business unfair." (p. 535).

Thereafter, the picketing began. There could be no question that ample evidence, independently of the picketing itself and of any result which might be reasonably anticipated to be caused by the picketing, was present to aid in establishing the illegal activity as a specific objective which the picketers were, *in fact*, seeking to achieve.

The same point is clear in

> *Local No. 10, Journeymen Plumbers* vs. *Graham*, 345 U. S. 192 (1953).

This court said that the picketing "was combined with conduct and circumstances occurring before and during the picketing that demonstrated * * * purpose." (p. 197). The conduct and circumstances are set out by the court in the excerpt from the testimony of O. J. Graham. He described a conference with the union leader in which the union had demanded that the job be 100% union, that a contract with a non-union plumbing contractor be cancelled and that the Virginia "right-to-work" statute be ignored by the employer-contractor. All of this was evidence additional to the picketing itself and of any employer action likely to result from the picketing. It is further to be stressed that in *Graham* whatever mention is made of the effects of the picketing—(and, here, it is effects that were shown to be *actual* and not merely *potential*)—is to indicate only that such effects were "confirmatory" of what had already been revealed to be the actual objective by other evidence. This court thus reiterated the need for independent evidence of a calculated objective—

additional evidence other than the fact alone of the picketing and of its results, actual or reasonably expectable.

The importance of the requirement is more strongly emphasized by this court's explicit warning in *Graham* that it will be

> "searching the record to determine whether the crucial finding [as to the purpose actually sought] had a reasonable basis in the evidence."

because, as disclosed in the accompanying footnote 4,

> "it is of prime importance that no constitutional freedom, least of all the guaranties of the Bill of Rights, be defeated by insubstantial findings of fact screening reality." (p. 197).

This court has thus held it to be requisite, before peaceful picketing may be constitutionally enjoined on the improper objective basis, that the record of the case disclose independent evidence supplementary to the fact of picketing itself or of any potential consequence of such picketing, all of which evidence in combination tends to prove an improper activity as the actually calculated objective sought to be achieved by the picketing. In the absence of such independent evidence, an injunction or other restraint outlawing peaceful picketing is unconstitutional.

In the case at bar, the failure of the Maine Court to distinguish purpose from effect, and its consequent undertaking to utilize the fact alone of economic loss resulting to the employer as a sufficient basis to negate the legal reality of peaceful picketing, by workers, directed at other workers at their place of employment to induce them to join a union, and to equate such picketing with picketing calculated to have the employer coerce his employees in their choice of bargaining representative, is an unconstitutional infringement of the right of free speech.

The matter is rendered the more important by the fact that the particular Maine statute which is invoked by the Maine

court to constitute a "solemn" declaration of the state's public policy is a single sentence, hidden away amongst provisions concerning the composition, duties and rule-making power of the Maine State Board of Arbitration and Conciliation, and provides for no sanctions of any kind.

This court has repeatedly held that peaceful picketing may be constitutionally restrained on the basis of an "improper" objective only if the purpose is found to involve a serious detriment to a law or policy which the state, *with justification*, deems important.

It is not reasonably justified to conclude that the single sentence tucked away in Section 15 of Chapter 30 of R. S. of 1954 is a truly "solemn" matter, really considered by the State of Maine to be of importance to the industrial welfare of the state. Not only the manner in which the sentence is inserted in the statutes, but its very provisions reveal that the State of Maine does not regard this statute to be of practical significance. No criminal or civil sanctions are imposed. No consequence of any kind, whether in the form of limitations or otherwise, is spelled out by the statute as flowing from the alleged policy statement favoring worker freedom of association. The legislative declaration is left floating in the statute books without being anchored to any specific industrial reality.

In the *Gazzam* case, supra, the State of Washington, even though it imposed no criminal or civil sanction for violation of the statute against employer coercion of employees, had at least imposed statutory limitations on the powers of the judiciary as a consequence of the expressed policy favoring freedom of workers to associate. It was such limitation on the judiciary which made the statutory policy more than a trivial matter in the eyes of this court.

In Maine, however, there is nothing of consequence issuing from the policy declared by the statute. The statute is mere lip-service. As the statute is written, and as Maine law now

stands, employers, engaged exclusively in intra-state commerce and who are not covered by the Taft-Hartley law, may, with impunity, threaten employees and discharge them from employment to preclude their joining unions and to prevent the institution of collective bargaining. No sanctions or remedies are available to employees thus coerced. Certainly, a state which allows such conditions and fails to implement its declaration of a policy favoring worker freedom of association cannot be said to be seriously concerned about the matter. The statutory declaration is but a formality, entirely devoid of substance.

It would, indeed, be a mockery of the Fourteenth Amendment and the Bill of Rights if so hollow a shell (as is Maine's statute concerning worker freedom of association) were to find its only kernel of substance in serving as a foundation to outlaw peaceful picketing by workers who seek, as here, solely to induce other workers to join with them in a union, in order ultimately to achieve collective bargaining.

> " * * * * We are mindful of the essential importance to our society of a vigilant protection of freedom of speech and press. States cannot consistently with our Constitution abridge those freedoms to obviate slight inconveniences or annoyances."
>
> *Giboney* vs. *Empire Storage & Ice Co.*, 336 U. S., 490, 501, 502 (1949).

III

As a more limited proposition, the Maine Court has decided that peaceful picketing by workers directed to other workers at their place of employment, to induce them to join a union, becomes illegal the moment any of the employees of the business concern leave their work on strike to participate in, or support, the picketing. The court's opinion is that a strike by employees to induce their fellow employees to join a union is an unlawful strike, such that peaceful picketing in conjunction therewith may be constitutionally illegalized as picketing "in support of" an illegal strike.

(Record, p. 19) (Appendix A, p. 26)

The Maine Court recognizes that this aspect of its analysis is merely subsidiary in the decision; it does not suffice, in and of itself, to support the court's holding in its full scope. The Maine court has stated in explicit language that the complete thrust of its decision is that, regardless of whether any employees are on strike, peaceful picketing by appellants directed at other workers at their place of employment to induce them to join appellants' union is illegal under Maine law, and that such restraint of peaceful picketing does not violate the Fourteenth Amendment of the Federal Constitution. The decree affirmed and the injunction issued pursuant thereto manifest that this is the true effect of the court's decision. The restraint of peaceful picketing which is sustained is not confined to such peaceful picketing as is conducted in support of a strike for organizational purposes. Rather, all peaceful picketing by the appellants of the employees of the appellee at their place of employment, to induce membership in appellants' union, is outlawed and enjoined *regardless of whether accompanied by a strike.*

(Record, pp. 21, 24, 27, 42 and 43) (Appendix A, pp. 27, 30, 33, 38, 39, 40)

Even though the issue involving the existence of a strike is thus subsidiary and partial as interpreted by the Maine court, it can be reached by this court and be deemed of controlling importance should this court conclude that, without more, peaceful picketing by appellants of other workers at their place of employment, to induce them to join appellants' union, may not, constitutionally, be enjoined or otherwise illegalized. Upon such holding, the issue would then arise whether the fact alone that some of the employees have left their employment to go on strike while the organizational picketing is continuing will suffice, as the Maine court has decided, to outlaw such peaceful picketing, otherwise constitutionally protected.

The practical consequence of the Maine court's decision is that constitutional protection, if it is afforded at all, applies only when "strangers," non-employees, are picketing the employees of a business concern at their place of employment to

induce them to join a union. The constitutional aegis disintegrates as soon as any employees cease work to join with the "strangers" in the picketing to persuade their fellow employees to become members of their union, as a preliminary to the institution of collective bargaining. To support this conclusion, obviously anomalous in the context of industrial reality, the Maine Court purports to rely upon a legalistic contention that the definition of a "strike" necessarily involves the proposition that the strikers are demanding action by their employer as a condition for terminating the strike. In an organizational dispute, according to the Maine Court, the existence of a strike can therefore have only one meaning: that the striking employees are thereby intending to exert pressure on their employer for the purpose of having him intervene to force their fellow employees into the union.

(Record, pp. 19 and 20) (Appendix A, pp. 26 and 27)

The Maine Court's analysis is not only industrially unreal but is conceptually unsound, and thus results in a violation of the Federal Constitution. A strike accompanying an organizational dispute does not, by definition, mean that the strikers are *necessarily* making demands upon their employer that he intervene and force the employees into the union in order to bring the strike to an end. In such a situation the striking employees may be entirely unconcerned as to what the employer will, or will not, do. The strikers may be absent from their work purely as a gesture of moral support and to prevent undermining the union's cause. They may be staying away from work because they refuse to cross picket lines or because they refuse to work with other employees who are displaying hostility to their cause of union solidarity. Thus, whether a strike is directed at the employer to cause him to interfere with the free choice of his employees is a *matter of proof,* either by evidence or stipulated fact. Such proof is entirely lacking in the present case. The issue cannot be treated, as the Maine Court has purported to deal with it, by resort to abstract legal definitions. The problems can be

answered, consistently with the Constitution, only by a showing of positive evidence to support a conclusion that the strikers were actually making demands upon their employer to have him interfere with the free choice of his employees as to their bargaining representative. In substance and effect, the Maine Court has perpetrated a "screening of reality" through "insubstantially supported findings" and has thereby abridged the right of free speech which is to be "guarded with a jealous eye."

It is, indeed, strange and perverted doctrine to emanate from the Maine Court, which in prior years had so carefully required that striking employees (not "strangers") be authorizing or supporting any peaceful picketing in an industrial setting as a *necessary* condition of its *legality* [*Keith's Theatre* vs. *Vachon*, 134 Me. 392 (1937)] that those very factors,—the participation of employees who are on strike,—now constitute a *sufficient* condition of the *illegality* of peaceful picketing by workers of other workers, conducted at the employer's premises, for organizational purposes.

Such distortion of the realities of industrial life perpetrates a violation of the constitutional guaranty of free speech embodied in the 14th Amendment. It is precisely an attempt by the Maine Court

> "to proscribe picketing * * * by setting artificial bounds, unreal in the light of modern circumstances to what constitutes an industrial relationship or a labor dispute."
>
> *I.B.T. Local 309* vs. *Hanke*, 339 U. S. 470, 479, 480 (1950).
>
> "The scope of the 14th Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state."
>
> *A.F.L.* vs. *Swing*, 312 U. S. 321, 326 (1941).

CONCLUSION

The questions herein presented are substantial and of public importance.

Respectfully submitted,

SIDNEY W. WERNICK,
Counsel for Appellants,
85 Exchange Street,
Portland, Maine.

APPENDIX A

(OPINION OF SUPREME JUDICIAL COURT SITTING AS LAW COURT)

THEODORE PAPPAS

vs.

CHARLES STACEY and WILLIAM WINSLOW

RESCRIPT

WILLIAMSON, J.

This is an appeal in equity from a permanent injunction against picketing for organizational purposes. The case was heard on bill, answer, replication, and an agreed statement of facts. The Defendants are officials of Local 390, Hotel and Restaurant Employees and Bartenders International Union, which for convenience may be referred to as "Local 390."

The agreed statement of facts is here set forth in full:

"1. (That) the said Plaintiff is the operator and owner of a certain restaurant or eating establishment known as and called Theodore's Lobster House, located at 123 Commercial Street in said Portland.

"2. (That) the said Defendants and their agents and servants have been and are conducting picketing at the place of business of your Plaintiff.

"3. The said picketing has been at all times peaceful picketing.

"4. At least three employees of the Plaintiff are on strike, two of whom have been participating in the picketing and the third of whom has been present at the site of the picketing. All three are members of the union, Local No. 390 of the Hotel and Restaurant Employees and Bartenders International Union.

"5. The Defendants and the three employees aforesaid who are on strike have been conducting the picketing for the sole purpose of seeking to organize other employees of the Plaintiff, ultimately to have the Plaintiff enter into collective bargaining and negotiations with the Union,

this being done as a preliminary for attempting to organize restaurant employees in other establishments throughout the State of Maine.

"6. The Plaintiff employs on an average thirty persons who would properly be subject to organization and of this thirty at least five are sporadic or transient employees.

"7. The business of the Plaintiff is a lawful business and if the picketing is illegal, the Plaintiff has been suffering and will continue to suffer damage in the conduct of his business which is irreparable and for which there is no adequate remedy at law."

There are, in our view, two issues: (1) Does the law of Maine prohibit peaceful picketing for organizational purposes under the circumstances of this case? (2) If so, is such picketing protected under the "free speech" provision of the Federal Constitution?

In ascertaining the law, or broadly speaking the public policy, which governs in this situation, we must consider the case of *Keith Theatre* vs. *Vachon, et als.*, 134 Me. 392, 187 A. 692 (1936), and the statute first enacted in P. L. 1941, c. 292, now R. S. c. 30, Sec. 15 (1954), reading:

"Workers shall have full freedom of association, self-organization and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection, free from interference, restraint or coercion by their employers or other persons . . ."

The parties are in accord that *Keith Theatre* vs. *Vachon, et als., supra,* is the only decision of our Court touching the issues. No question arises whether jurisdiction of the case lies in the federal or state courts.

We are free to find the facts in this appeal without reference to the findings of the single Justice. The firmly established principle "that his decision, as to matters of fact, should not be reversed, unless it clearly appears that such decision is erroneous" found in *Young* vs. *Witham,* 75 Me. 536 (1884), is not here applicable. "The claim has no merit in a

case which involves no oral testimony." *Mellen, Jr., et al., Tr.* vs. *Mellen, Jr., et al.*, 148 Me. 153, 90 A. 2d. 818 (1952).

There are certain facts stated in or inferred from the agreed statement to be discussed before turning to the precise issues.

(1) The picketing is peaceful and effective. In a sense the picket line is a wall erected between the Plaintiff's restaurant and the public. We may fairly infer that the public, or those who supply the needs of Plaintiff's business, or more likely persons in both categories, refuse to cross the picket line or scale the wall.

At the moment we are not considering the objective of the picketing. If the purpose were to secure higher wages, or shorter hours, the immediate damage from the picketing would be like in kind and perhaps in degree to that suffered by the Plaintiff.

(2) The Plaintiff has not interfered with organizational activities by Local 390 or the striking employees among the other employees, apart from seeking injunctive relief against picketing. There is no suggestion that the Plaintiff has objected to or interfered with the persuasion of the employees to join Local 390, except in this action.

(3) The objective of the strike of three union employees is not specifically stated. The picketing, however, has been conducted by the Defendants and by the striking employees "for the sole purpose of seeking to organize other employees of the Plaintiff. . . ." It is apparent, therefore, that the strike of the three employees and the picketing are being conducted for the same objective.

(4) There are no grievances existing between the Plaintiff and the employees, including the three on strike, relating to wages, hours, and conditions of employment. The Defendants alleged such grievances in their answer. There is, however, a total lack of such claims in the agreed statement. On the record the grievance (if it may be called such) of the De-

fendants is not with the Plaintiff, but with the employees for not joining Local 390.

We are here concerned, as we have seen, with picketing solely for organizational purposes. Whether the labor-management relationship in the Plaintiff's restaurant "ultimately," to quote from the agreed statement, shall take the form of a closed union, preferential union, or nonunion shop, or any other type, is not the point at issue. Our question remains whether the Defendants may press for their immediate purpose "of seeking to organize other employees" by peaceful picketing, at the Plaintiff's place of business.

(5) The fact that the picketing is part of a plan for the organization of restaurant employees throughout the State, is not of weight in the case. If the picketing is lawful for organizational purposes at the Plaintiff's restaurant, it does not become unlawful from the stated broader purpose. It is enough that we here consider picketing for organizational purposes among the twenty-seven nonunion employees of the Plaintiff.

We are of the opinion that the strike by the three union employees for organizational purposes is an unlawful strike. It follows that picketing in support of such strike, although peaceful, is likewise unlawful and may be enjoined.

In *Keith Theatre* vs. *Vachon, supra,* at p. 397, a strike has been defined to be "a combined effort among workmen to compel the master to the concession of a certain demand, by preventing the conduct of his business until compliance with the demand." In Restatement, Torts Sec. 797, comment *a* (1939) we find: *"Definition of strike.* A strike is a concerted refusal by employees to do any work for their employer, or to work at their customary rate of speed, until the object of the strike is attained, that is, until the employer grants the concession demanded."

The purpose of the strike, we repeat, is "for the sole purpose of seeking to organize other employees of the Plain-

tiff. . . ." A strike for organizational purposes is by definition a strike to obtain from the employer a concession which he may grant. "A strike necessarily assumes the existence of a grievance. To right the asserted wrong is its purpose." *Keith Theatre, supra,* at p. 398. In this instance the purpose of the strike necessarily is to compel the employer to bring pressure upon the employees to join Local 390. For what other purpose under the circumstances of this case are the employees on strike?

Under the statute enacted in P. L. 1941 c. 292, *supra,* the employee, or worker, is protected from "interference, restraint or coercion by their employers or other persons. . . ." The worker must be left free from interference by employer or other persons in reaching a decision whether to join or refrain from joining a union. It follows necessarily that pressure cannot lawfully be directed against the employer to force him to interfere with the free choice of his employees. The Plaintiff cannot lawfully be placed in a position where compliance with the strikers' demands requires action in violation of the law of the State.

This is, however, precisely what the strikers here seek to accomplish. In brief, the strike for organizational purposes is unlawful for it is by its very nature destructive of the protection for the employees provided by the statute of 1941, *supra.*

We do not base our decision, however, solely upon the fact of an unlawful strike. Treating the case as if only picketing were involved, we reach the same result.

In our view peaceful picketing for organizational purposes is unlawful under our law, and may be enjoined. For the moment we approach the problem, having in mind the "labor-relations" principle in distinction from the "picketing-free speech" principle. Although there is no dispute between the Plaintiff and his employees, yet the employer, on the Defendants' theory, may be subjected to irreparable loss from

action directed in terms to the persuasion of nonunion employees to join a union.

A coercive force is generated by the picketing to secure new members for the union. It is apparent that this force is applied to the employer to urge his employees to join the union to save his business, and to the employees to join to save their livelihood.

In reaching for the employees, there is a steady and exacting pressure upon the employer to interfere with the free choice of the employees in the matter of organization. To say that the picketing is not designed to bring about such action is to forget an obvious purpose of picketing—to cause economic loss to the business during noncompliance by the employees with the requests of the union.

We turn again to the statute, *supra*, protecting the worker in his unquestioned right to organize and bargain collectively free from "interference, restraint or coercion by their employers or other persons. . . ." We have discussed the problem with particular reference to the strike and the employer. The employer may neither interfere nor be compelled to interfere with his employees in matters of organization. He cannot lawfully stop *his loss* from picketing by denying full freedom of association to his employees. Freedom to associate of necessity means as well freedom not to associate.

The same restraints are applicable to "other persons." They are likewise forbidden to interfere. We see no reason why labor union officials, as here, are not included within the definition of "other persons." Granted the organization sought by the Defendants (and by the strikers) may be in the best interests of the employee, it yet remains his privilege to accept or reject the proposal. He may for example have no desire for union affiliation, or he may have a preference for a union other than that represented by the Defendants. In either case, the choice rests with the employee. The freedom of the employee thus remains a reality.

The employee cannot escape a share of the irreparable damage admittedly caused to the business on which his livelihood depends. Irreparable damage to employer must in any appreciable period be like damage to the employee. The Defendants say in substance to the twenty-seven nonunion workers "join with us or we will continue to harm the business in which you are employed."

The picketing is at least an act of interference with the employee in the exercise of his personal rights. It violates the language and the purpose of the statute, *supra,* and it is unlawful.

The Defendants urge that the *Keith Theatre* case, *supra,* does not control the decision and that the 1941 statute, *supra,* has no force as the expressed public policy of the State. In the *Keith Theatre* case, *supra,* the Court enjoined stranger picketing, in which no employee took part. A principal purpose of the picketing was to compel the Theatre "to adopt the so-called closed shop agreement. . . ." The decison was placed on the ground that stranger picketing was unlawful. The ruling by the Supreme Court of the United States to the contrary in *American Federation of Labor* vs. *Swing,* 312 U. S. 321, 61 S. Ct. 568 (1941) had not then been made. Our Court refused to decide whether a strike or picketing by employees to secure unionization for their own benefit would have been lawful. The Court said on page 400 with apparent approval in what may be regarded as dictum:

> "While we need not go so far in this case as to hold that the employees themselves could not picket peaceably * * * to secure unionization, yet there is much eminent authority to that effect."

and again on page 403:

> "But be it as it may (as to whether *employees themselves* can lawfully strike or picket peaceably to secure unionization), we do not think that it was lawful for *these Defendants* to picket even peaceably to secure unionization by the employer of its satisfied and non-striking employees."

The Defendants argue that, assuming the rule is established by the dictum, *Keith Theatre* and the instant case are distinguishable on the ground that the former involves unionization and the latter organization only.

It is unnecessary in our view of the case to discuss distinctions between the "unionization" of the *Keith Theatre* case in 1936, and the attainment of a union or closed shop or any other form of conditioning employment on union membership. The purpose of the picketing here, that is the immediate purpose, is solely to bring employees into Local 390. We are not interested in the ultimate form of the relations between the Plaintiff and his employees.

There is a clear difference between the attainment of an agreement for employment conditioned in some form on union membership, and the persuasion of employees to join a union. In the former case, action is required by the employer. Only with agreement of union and the employer can the objective be reached. In the latter case, however, no connection between employer and employee necessarily exists. The union may reach and persuade the employee to join without directly touching or affecting the interests of the employer.

We direct our decision to the case of picketing solely for organizational purposes. We need not, nor do we, pass upon the lawfulness of a strike or picketing for other purposes.

The second question is whether the picketing is protected as "free speech" under the Federal Constitution. "The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state." *Thornhill* vs. *State of Alabama*, 310 U. S. 88, 60 S. Ct. 736, 740 (1940). The Supreme Court has developed and applied the "picketing-free speech" principle in a series of cases since the *Thornhill* case. See

annotations of Supreme Court cases in 94 L. Ed. 976, 977, and cases cited in *Building Service Employees Internat'l Un.* vs. *Gazzam*, 339 U. S. 532, 70 S. Ct. 784 (1950). For our purposes the governing principles sufficiently appear in the cases discussed below.

In the *Gazzam* case, *supra*, it was held that a state may without abridging the right of free speech restrain picketing for a purpose unlawful under its laws and policies, even though a statute expressing such policy has no criminal sanctions.

The purpose of the picketing in *Gazzam, supra*, was to compel the proprietor of a hotel to coerce his employees, no one of whom was a member of a union, in the choice of a bargaining representative. The union insisted the employer sign a contract requiring his employees to join the union.

The Court said, at p. 787:

> "This Court has said that picketing is in part an exercise of the right of free speech guaranteed by the Federal Constitution."
>
> * * * * *
>
> "But since picketing is more than speech and establishes a *locus in quo* that has far more potential for inducing action or nonaction than the message the pickets convey, this Court has not hesitated to uphold a state's restraint of acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity."
>
> * * * * *
>
> "The State of Washington has by legislative enactment declared its public policy on the subject of organization of workers for bargaining purposes. . . . Under the so-enunciated public policy of Washington, it is clear that workers shall be free to join or not to join a union, and that they shall be free from the coercion, interference, or restraint of *employers of labor* in the designation of their representatives for collective bargaining. Picketing of an employer to compel him to coerce his employees' choice of a bargaining representative is an attempt to induce a transgression of this policy, and the State here restrained the advocates of such

transgression from further action with like aim. To judge the wisdom of such policy is not for us; ours is but to determine whether a restraint of picketing in reliance on the policy is an unwarranted encroachment upon rights protected from state abridgment by the Fourteenth Amendment.

"Petitioners insist that (*American Federation of Labor* vs. *Swing*, 312 U. S. 321, 61 S. Ct. 568) is controlling. We think not. In that case this Court struck down the State's restraint of picketing based solely on the absence of an employer-employee relationship. An adequate basis for the instant decree is the unlawful objective of the picketing, namely, coercion by the employer of the employees' selection of a bargaining representative."

* * * * *

"The Washington statute has not been construed by the Washington courts in this case to prohibit picketing of workers by other workers. The construction of the statute which we are reviewing only prohibits coercion of workers by employers."

The Washington statute, quoted in *Gazzam*, *supra*, provides for freedom of "the individual unorganized worker . . . from interference, restraint, or coercion of employers of labor, or their agents. . . ." The language comes from the Norris-LaGuardia Act of 1932, 29 U.S.C.A., Sec. 102. Our statute significantly reads *"employers or other persons."*

In *Local Union No. 10, Etc.* vs. *Graham*, 345 U. S. 192, 73 S. Ct. 585 (1952), the Court upheld an injunction against peaceful picketing when carried on for purposes in conflict with the Virginia Right to Work Statute. A substantial purpose was to prevent nonunion employees from working on the project. The Court said, at p. 589:

"The immediate results of the picketing demonstrated its potential effectiveness, unless enjoined, as a practical means of putting pressure on the general contractor to eliminate from further participation all nonunion men or all sub-contractors employing nonunion men on the project."

The Massachusetts Court, through Justice Wilkins, has stated in apt language our position taken in light of the decisions of the Supreme Court in *Colonial Press* vs. *Ellis*, 321 Mass. 495, 74 N. E. 2d 1 (1947), at p. 4:

> "The Defendants rely upon certain of the more recent cases in the Supreme Court of the United States. . . . We do not understand, however, that that court has held that picketing in support of an unlawful objective cannot be enjoined. . . . Until there is an unequivocal pronouncement to that effect we adhere to the view of the law laid down in our own decisions."

The 1941 statute, *supra,* is a solemn declaration of the public policy of our State. It is the law, duly enacted by the Legislature, which must govern the decision in this case. Within the plain and clear meaning and intent of the statute we find, as we have indicated, a public policy against peaceful picketing at the place of business for organizational purposes. In our opinion the restraint of such picketing does not abridge the right of free speech under the decisions of the Supreme Court.

There was no error in the issuance of the injunction.

The entry will be

Appeal dismissed.

Decree affirmed.

Tapley, J. Did not sit.

(MANDATE FROM LAW COURT)

STATE OF MAINE

In the SUPREME JUDICIAL COURT for the State.

THEODORE PAPPAS

vs.

CHARLES STACEY and WILLIAM WINSLOW

In the above entitled case brought before the Supreme Judicial Court sitting as a Court of Law from the Supreme Judicial Court in Equity for the County of Cumberland and now pending on the Law Docket, the said case having been heard and maturely considered,

IT IS NOW ORDERED, That the Clerk of the Law Court now having the custody of the Law Docket enter upon said docket under said case, and certify to the Clerk of the Supreme Judicial Court in Equity for the County of Cumberland the following order, direction, judgment and decree of the Court in said case, to wit:

Appeal dismissed.

Decree affirmed.

By the Court,

ROBERT B. WILLIAMSON,
Justice.

Dated May 27, A. D. 1955.

(May 31, A. D. 1955, Received, entered and filed by Leslie E. Norwood, Clerk of Law Court.)

(CERTIFICATE OF DECISION FROM CLERK OF LAW COURT)

STATE OF MAINE

LAW COURT — Portland, May 31, 1955.

THEODORE PAPPAS

vs.

CHARLES STACEY and WILLIAM WINSLOW

In the above entitled case brought before the Court as a Court of Law from the Supreme Judicial Court for the County of Cumberland and now pending on the Law Docket, the said case having been heard and maturely considered,

IT IS NOW ORDERED, That the Clerk of the Law Court now having the custody of the Law Docket enter upon said docket under said case, and certify to the Clerk of the Supreme Judicial Court for the County of Cumberland the following order, direction, judgment and decree of the Court in said case, to wit:

Appeal dismissed.

Decree affirmed.

Attest:

LESLIE E. NORWOOD,
Clerk of Law Court.

To LESLIE E. NORWOOD, ESQ.,

Clerk of Courts for the County of Cumberland.

(DECREE)

STATE OF MAINE

CUMBERLAND, ss. SUPREME JUDICIAL COURT
IN EQUITY

THEODORE PAPPAS d/b/a THEODORE'S LOBSTER HOUSE

vs.

CHARLES STACEY, et als.

DECREE

Hearing had on question of issuance of permanent injunction.

Plaintiff in his Bill seeks injunctive relief alleging that the Defendants are conducting a picket in front of his place of business located at No. 123 Commercial Street in Portland, Maine; that the purpose of the picketing is compulsion of the Plaintiff to unionize his business.

The factual questions are agreed upon through the medium of an agreed statement of facts. Paragraphs "4" and "5" are the most relevant and germane to the issue. These paragraphs read as follows:

> "4. At least three employees of the Plaintiff are on strike, two of whom have been participating in the picketing and the third of whom has been present at the site of the picketing. All three are members of the union, Local No. 390 of the Hotel and Restaurant Employees and Bartenders International Union.
>
> "5. The Defendants and the three employees aforesaid who are on strike have been conducting the picketing for the sole purpose of seeking to organize other employees of the Plaintiff, ultimately to have the Plaintiff enter into collective bargaining and negotiations with the Union, this being done as a preliminary for attempting to organize restaurant employees in other establishments throughout the State of Maine."

Regarding the law side of the case, counsel for both Plaintiff and Defendants agree that the case of *Keith Theatre* vs. *Vachon, et als.*, 134 Maine 393, is the only Maine case affecting the issues but they disagree as to its interpretation in light of the agreed statement of facts.

According to Paragraphs "4" and "5" of the statement of facts, at least three employees of the Plaintiff are on strike, two of whom are participating in the picketing and the third has been present at the site of the picketing, and all three are members of the Defendant union.

It is frankly stated that the sole purpose of the picketing is to effect organization of the other employees of the Plaintiff and ultimately to have the Plaintiff enter into collective bargaining and negotiations with the union, and that this action is preliminary to attempting organization of restaurant employees in other establishments throughout the State of Maine.

It is to be noted that there is absent from the statement of facts any suggestion that there is any dissatisfaction on the part of the three union employees and their employer, the Plaintiff, as to wages and working conditions, which leaves the only consideration that of whether or not the Plaintiff is entitled to permanent injunctive relief when his place of business is being picketed by the Defendants "for the sole purpose of compelling your said Plaintiff to unionize his business."

The case of *Keith Theatre* vs. *Vachon, et als.* was decided in 1936. The opinion in this case written by the late Justice Hudson held in substance that picketing was not permissible to force unionization. It is to be noted that the Vachon case differs from the present one in that no employee of Keith Theatre was a union member or participated in the picketing.

Counsel for the Defendants strenuously contends that the Vachon case should be overruled primarily because of the case of *A. F. of L.* vs. *Swing,* 312 U. S. 321 (1941). This case

holds that picketing under similar circumstances as obtains in this case is legal and proper and should not be enjoined. In interpreting the Swing case, the State Courts have expressed opposite views, some concurring, others dissenting. Those of the State Courts on the dissenting side include Maine.

The Vachon case determines the position of the Maine jurisdiction when it states on page 400, the following language:

> "Had there been a grievance and had a strike by the Plaintiff's employees resulted from it, even if it were held that they could picket peaceably to secure unionization for their own benefit, non constat that these Defendants, their agents and servants, could picket though peaceably. While we need not go so far in this case as to hold that the employees themselves could not picket peaceably or strike to secure unionization, yet there is much eminent authority to that effect.
>
> 'Strikes to secure recognition of the union, to force discharge of nonunion men, or to effect a closed shop have been held illegal. * * * *
>
> The question whether the closed shop is a legitimate subject of industrial dispute is one of considerable difficulty. In the majority of cases it has been held that, on account of its tendency to give union labor a monopoly, it is not a legitimate aim.' "

It holds to the position that picketing to secure recognition of union and closed shop is illegal, which appears to be in line with some Massachusetts decisions of more recent date than the Vachon case. *Fashioncraft, Inc.* vs. *Halpern, et al.*, 313 Mass. 385. *The Colonial Press, Inc.* vs. *Ellis, et als.*, 321 Mass. 495. *Davis Brothers Fisheries Co., Inc.* vs. *Piamentel, et al.*, 322 Mass. 499.

The Court is not convinced, by force of the record, that the Vachon case should be disturbed.

The Defendants, Charles Stacey, William Winslow, Officials of Local No. 390, Hotel and Restaurant Employees and Bartenders International Union, their agents, employees and servants should be permanently enjoined from conducting

and carrying on picketing at the place of business of the Plaintiff located at 123 Commercial Street, Portland, Maine.

Permanent injunction to issue.

December 2, 1954.

WALTER M. TAPLEY, JR.,
Justice, Supreme Judicial Court.

(Received and filed December 2, 1954.)

(WRIT OF INJUNCTION)

STATE OF MAINE

(LS)

CUMBERLAND, ss. SUPREME JUDICIAL COURT

To the SHERIFFS of our several Counties or to either of their DEPUTIES:

GREETING:

WE COMMAND YOU to make known to CHARLES STACEY and WILLIAM WINSLOW, Officials of Local No. 390, Hotel and Restaurant Employees and Bartenders International Union, a voluntary and unincorporated labor union having a place of business at Portland in said County of Cumberland, that

THEODORE PAPPAS

d/b/a Theodore's Lobster House, of said Portland, having filed his Bill in Equity before our Supreme Judicial Court, within and for said County of Cumberland, therein alleging that the said Defendants and their agents and servants have and are conducting picketing at the place of business of said Plaintiff, at 123 Commercial Street in said Portland;

That now, after hearing and consideration thereof by the Justice of said Supreme Judicial Court, they, the said CHARLES STACEY and WILLIAM WINSLOW, Officials of Local No. 390, Hotel and Restaurant Employees and Bartenders International Union, their attorneys, employees, servants and agents are permanently enjoined and commanded by our said Court, under the penalty of fine or imprisonment as the Court may order therein, absolutely to desist and refrain from conducting and carrying on picketing at the place of business of the said Plaintiff, Theodore Pappas, located at 123 Commercial Street in said Portland, and from any and all attempts, directly or indirectly, to accomplish such object.

HEREOF FAIL NOT and forthwith make due return of this Writ with your doings thereon to our said Supreme Judicial Court, at Portland aforesaid, this second day of June in the year of our Lord one thousand nine hundred fifty-five.

LESLIE E. NORWOOD,
Clerk, said Supreme Judicial Court.

STATE OF MAINE

CUMBERLAND, ss. Portland, June 6th, A. D. 1955.

I this day made service of the within PERMANENT WRIT OF INJUNCTION UPON THE within named William Winslow, by giving to him in hand a true and attested copy of the within writ. Said copy being duly attested by Leslie E. Norwood, Clerk of the Supreme Judicial Court.

Fees:	Service	$2.00
	Travel	.20
		$2.20

ROBERT K. BURNHAM,
Deputy Sheriff.

STATE OF MAINE

CUMBERLAND, ss. Portland, June 6th, A. D. 1955.

I this day made service of the within PERMANENT WRIT OF INJUNCTION UPON THE within named Charles Stacey, by giving to him in hand a true and attested copy of the within writ. Said copy being duly attested by Leslie E. Norwood, Clerk of the Supreme Judicial Court.

Fees:	Service	$2.00
	Travel	.20
		$2.20

ROBERT K. BURNHAM,
Deputy Sheriff.

41/4

FILED
SEP 10 1955
HAROLD B. WILLEY, Clerk

In The Supreme Court of The United States

OCTOBER TERM, 1955

No. 336

CHARLES STACEY and WILLIAM WINSLOW,
Appellants,

vs.

THEODORE PAPPAS,
Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

MOTION TO DISMISS THE APPEAL

ISRAEL BERNSTEIN,
97 Exchange Street,
Portland, Maine,
Attorney for Appellee.

SUMNER T. BERNSTEIN,
97 Exchange Street,
Portland, Maine,
JAMES A. CONNELLAN,
102 Exchange Street,
Portland, Maine,
Of Counsel.

Marks Printing House, Portland, Me.

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In The Supreme Court of The United States

OCTOBER TERM, 1955

No. 336

CHARLES STACEY and WILLIAM WINSLOW,
Appellants,

vs.

THEODORE PAPPAS,
Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

MOTION TO DISMISS THE APPEAL

Plaintiff-Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal from the final judgment and decree of the Supreme Judicial Court of the State of Maine be dismissed on the grounds that the appeal does not present a substantial Federal question.

STATEMENT

This litigation was begun by a proceeding in the equity courts of the State of Maine to enjoin the picketing of the restaurant of the Plaintiff-Appellee at Portland, Maine, by the Defendants-Appellants for organizational purposes. It was heard upon the following agreed statement of facts:

"1. (That) the said Plaintiff is the operator and owner of a certain restaurant or eating establishment known as and called Theodore's Lobster House, located at 123 Commercial Street in said Portland.

"2. (That) the said Defendants and their agents and servants have been and are conducting picketing at the place of business of your Plaintiff.

"3. The said picketing has been at all times peaceful picketing.

"4. At least three employees of the Plaintiff are on strike, two of whom have been participating in the picketing and the third of whom has been present at the site of the picketing. All three are members of the union, Local No. 390 of the Hotel and Restaurant Employees and Bartenders International Union.

"5. The Defendants and the three employees aforesaid who are on strike have been conducting the picketing for the sole purpose of seeking to organize other employees of the Plaintiff, ultimately to have the Plaintiff enter into collective bargaining and negotiations with the Union, this being done as a preliminary for attempting to organize restaurant employees in other establishments throughout the State of Maine.

"6. The Plaintiff employs on an average thirty persons who would properly be subject to organization and

of this thirty at least five are sporadic or transient employees.

"7. The business of the Plaintiff is a lawful business and if the picketing is illegal, the Plaintiff has been suffering and will continue to suffer damage in the conduct of his business which is irreparable and for which there is no adequate remedy at law."

The injunction was issued as prayed for and on appeal the Supreme Judicial Court of the State of Maine dismissed the appeal and affirmed the decision below. The entire record of this litigation has been prepared and submitted to this Court.

It may be stated in brief summary of the decision of the Supreme Judicial Court of the State of Maine that the Maine Court rested its decision on Section 15 of Chapter 30 of the Revised Statutes of Maine, 1954, which reads, in pertinent part, as follows:

"Workers shall have full freedom of association, self-organization and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection, free from interference, restraint or coercion by their employers or other persons . . ."

The Maine Court found that the statute was designed to assure employees freedom from the stated pressures from *any* source in the making of employee organizational decisions and that the picketing created pressures in violation of the statute. The Maine Court also found that the injunction did not violate the provisions of the Federal constitution.

ARGUMENT

The State of Maine, acting through its legislative and judicial branches, has declared that employees shall be free from interference, restraint or coercion by their employers

or other persons in their association, self-organization and designation of representatives. This policy is set forth in the statute and applied in the instant case. A reading of the statute and of the decision involved makes clear the public policy of the State. The issue before this Court may be stated as in

> *Building Service E. I. U.* vs. *Gazzam,* 339 U. S. 532, 94 Law Ed. 1045 (1950):

"To judge the wisdom of such policy is not for us; ours is but to determine whether a restraint of picketing in reliance on the policy is an unwarranted encroachment upon rights protected from State abridgment by the Fourteenth Amendment."

The policy of the State of Maine is oriented to the protection of the rights and freedoms of employees. It is not oriented to protect any economic interests of any persons other than employees; it is not limited in its application to the existence of an employer-employee relationship among those it governs; it is not to protect the interests of any possible party concerned in a matter as against the interests of any other such party. The purpose of this legislation is to preserve freedom. The application of this policy in the instant case is to protect the employees of the Plaintiff-Appellee from interference, restraint or coercion by their employer or other persons.

Maine has thus erected certain safeguards in the area of labor law which concern the protection of workers in the freedom of their organizational activity and this Maine policy is consistent with the State legislative approaches which have many times been ruled upon and approved by this Court. The safeguards provided by the State of Maine encompass not only action by employers, but action by other persons as well, which would impinge upon the freedom of choice which the statute seeks to preserve. This may be a protection of employee freedom different from the protection afforded in

some other jurisdictions in that its scope bars action by persons other than employers. But in the recognition of the validity of the freedom of working men from interference, restraint or coercion in their organization the source of such forces is not the basis for a difference in judicial approach. And there certainly exists here no substantial question which requires the decision of this Court.

The next consideration is the character of picketing. This Court has cast picketing in its proper light: "This Court has said that picketing is in part an exercise of the right of free speech guaranteed by the Federal Constitution (citations). But since picketing is more than speech and establishes a locus in quo that has far more potential for inducing action or nonaction than the message the pickets convey, this Court has not hesitated to uphold a state's restraint of acts and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity." *Gazzam* case, *supra.*

"No opinions relied on by petitioners assert a constitutional right in picketers to take advantage of speech or press to violate valid laws designed to protect important interests of society. . . . It has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced or carried out by means of language either spoken, written, or printed. . . . Such an expansive interpretation of the constitutional guarantees of speech and press would make it practically impossible, however, to enforce laws against agreements in restraint of trade, as well as many other agreements and conspiracies deemed injurious to society."

> *Giboney* vs. *Empire Storage and Ice Company,* 336 U. S. 490, 93 Law Ed. 834 (1949).

It is basic in the many decisions of this Court that this Court has thus recognized that picketing can in fact be designed to cause coercion, interference and restraint upon the

decisions and actions of men in violation of law, and that picketing in itself can be the coercion, interference and restraint by virtue of its "potential for inducing action or non-action." If there is a distinction between picketing designed to cause coercion, interference and restraint and picketing which itself causes coercion, interference and restraint, then it is a distinction without a difference and certainly it offers no question of any substance which requires the decision of this Court.

The validity of these positions can also be shown by an analysis of the approach taken by the Defendants-Appellants in the jurisdictional statement in this matter. This approach consists of two major aspects.

The first is the attempt to argue that the Maine law is entitled to no consideration by this Court. A brief examination of this argument of the Defendants-Appellants reveals its weakness and distortion. The legislation here involved is not designed to defeat the interests of working men. Its purpose is exactly the opposite and there is nothing in its wording or construction or in its application which supports the position of the Appellants. This legislation is designed to protect and sponsor neither employer interests nor the interests of organized labor; rather it is designed to create a free atmosphere and area to protect the worker in the evolution of his own free decision in these matters. It is simply and strongly stated in the statute and cannot be misconstrued as to its intent or purpose in the declaration of State policy. The fact that those particularly interested in organizing the workers into unions have run afoul of the statute proves its efficacy and validity and not any weakness or lack of true legislative impact. The fact also that this is the first case in the implementation of the statute is proof, not denial, of the vigor of the statute. Simply stated the argument of the Defendants-Appellants seems to be that the law cannot be good since it applies to them and affects them.

The second facet of the Defendants-Appellants' argument is that the decision of the Maine Court is not based on fact. The agreed statement of facts in this matter states that the Plaintiff-Appellee had, and would have, suffered irreparable damage as a result of continued picketing. This Court has characterized picketing as noted hereinabove. The Maine Court concurs with this Court in the appraisal of picketing and of the consequences of picketing and reached its conclusions on the admitted fact of the irreparable damages caused by the picketing in terms of the application of this reality to the day-to-day affairs of the restaurant business of the Plaintiff-Appellee. The Plaintiff-Appellee, as the Maine Court points out, faces an irreparable situation from which there is no release except to violate the law and the Plaintiff-Appellee's employees, whom the law seeks to assure a freedom from interference, coercion and restraint from any source, are in the equivalent economic vise created by the dilemma which faces the Plaintiff-Appellee employer. The argument of the Defendants-Appellants, which would deny to the Maine Court the right to make this analysis and draw these conclusions from fact, would impose completely unrealistic limitations on any Court and would create a completely invalid frame work for the judicial evaluation of the issues here involved. There is no absence of a factual basis for the evaluation of the effects of the picketing in the instant case.

The Defendants-Appellants then combine these two facets by arguing that the basis of the Maine decision is economic damage to the Plaintiff-Appellee and that alone. This is not the case. The basis of the Maine decision is the statutory guarantee of employee freedom of choice. The economic damage is rather the component which supports and proves the fact of the violation of the conditions established for the preservation of that freedom.

The Defendants-Appellants seek to create an issue where none exists and a true analysis shows that there is no sub-

stantial question here which requires the decision of this Court.

It is respectfully submitted, therefore, that the appeal herein should be dismissed.

ISRAEL BERNSTEIN,
Counsel for Plaintiff-Appellee.

SUMNER T. BERNSTEIN,
JAMES A. CONNELLAN,
Of Counsel.

September, 1955.

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In The Supreme Court of The United States

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CHARLES STACEY and WILLIAM WINSLOW,
Appellants,

vs.

THEODORE PAPPAS,
Appellee.

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

BRIEF OF APPELLANTS

Opposing Motion To Dismiss Appeal

SIDNEY W. WERNICK,
85 Exchange Street,
Portland, Maine,
Attorney for Appellants.

Marin Printing House, Portland, Me.

In The Supreme Court of The United States

OCTOBER TERM, 1955

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ARGUMENT

I

The decision of the high court of Maine—that effective peaceful picketing of workers at their place of employment, although directed at the proper objective of having non-union employees become members of a union, is nevertheless an unlawful, because coercive, means to achieve such objective—raises an important and substantial issue relating to the constitutional guarantee of free speech.

We direct attention to appellee's claim that the Supreme Judicial Court of Maine has created no federal question of substance by its decision that peaceful picketing, conducted by appellants at appellee's place of business and directed at non-union employees of appellee for the purpose of having them join appellants' union, constitutes unlawful coercion of such employees.

Appellee's claim is made in spite of his concession that

> "picketing is in part an exercise of the right of free speech guaranteed by the Federal Constitution". (*Motion To Dismiss*, p. 5).

Since any state violation of so "jealously guarded" a constitutional guarantee as free speech would normally precipitate a federal question of substance, the burden lies upon appellee to indicate the existence of special circumstances which render the present issue unworthy of this court's attention.

In an attempt to sustain this burden, appellee points to the single factor that the peaceful picketing has been effective, in that it has induced the public to withhold patronage and services from appellee's business. (*Motion To Dismiss*, p. 7; *Jurisdictional Statement*, Appendix A, p. 25). Appellee maintains that it is this economic injury to his business caused by the public's response to the picketing and its indirect impact on his employees which, consistently with the Fourteenth Amendment, may be fastened upon by the State of Maine as the "component" transforming the peaceful picketing into a "coercive" and, therefore, illegal instrumentality. Apparently, it is appellee's further position that these conclusions find sufficient sanction in doctrine previously promulgated by this court to require no new consideration of the issues raised.

Appellee's argument is entirely without merit. Prior decisions of this court, and the rationale underlying the decisions, afford overwhelming portent that the Maine court has done violence to the Fourteenth Amendment of the United States Constitution.

In *Thornhill* vs. *Alabama,* 310 U. S. 88 (1940) this court ruled:

> "It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society. But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests". (p. 104).

In *Carlson* vs. *California,* 310 U. S. 106 (1940), the precise factor relied upon by the Maine court as the special basis to avoid constitutional transgression in holding peaceful picketing coercive and therefore illegal—damage caused to a business by loss of patronage and the services of suppliers—was explicitly considered and rejected.

Finally, the two decisions of this court from which the appellee quotes general language, *Building Service Employees International Union* vs. *Gazzam,* 339 U. S. 532, and *Giboney* vs. *Empire Storage and Ice Company,* 336 U. S. 490, provide no support for appellee's claims. There is no intimation in *Giboney,* either in decision or language, that peaceful picketing may be deemed to be an unlawful instrumentality when, and by virtue of the fact that, it inflicts economic damage upon the persons at whom it is directed.

It would seem that the *Gazzam* case may be regarded as one of the more recent cases indicating the error, rather than the soundness, of appellee's argument. In *Gazzam,* this court took pains to state explicitly that the various matters here under

discussion were excluded from that decision. In the instant case, the Maine court has construed and applied a Maine statute to outlaw, as interference restraint or coercion, peaceful picketing by workers of other non-union workers; the *Gazzam* opinion noted that the Washington statute had no such effect and that it had

> "not been construed by the Washington court to prohibit picketing of workers by other workers". (p. 539).

Here, the Maine court, and the appellee, are contending that the peaceful picketing, because it damages the business on which the employees depend for their livelihood and thereby clamps them in an "economic vise" (*Motion To Dismiss,* p. 7) is, *in itself,* "coercion and restraint" of the employees, outlawed by the Maine statute. In *Gazzam,* however, this court was scrupulously careful to mention that no contention was being asserted that peaceful picketing, *per se,* is constitutionally enjoinable as a form of coercion.

Thus, the import of the decisions and reasoning of this court on the subject of peaceful picketing is that it is unconstitutional to treat peaceful picketing (directed at employees to achieve organization) as an instrumentality which is coercive and impairs the free choice of employees, solely by virtue of the fact that the picketing induces the public to withhold patronage or services from the business on which the employees depend for their livelihood. Regardless of the outcome of the matter on the merits, however, surely the least that can be said is that a serious question of constitutionality appears.

Manifestly, the magnitude of the constitutional question cannot be diminished by quoting, as does appellee, general language removed from the context of the decisions in *Giboney* and *Gazzam.* Such language suggests only that peaceful picketing, found to be an abuse of the right to picket because aimed at accomplishing a violation of an important state policy, may be constitutionally enjoined. It has no relevance to the position here asserted by appellee and the Maine court, that peaceful picketing, although directed to an

entirely lawful objective—increasing union membership—is, nevertheless an unlawful means of accomplishing that end when, and because, it causes economic damage to the non-union employees sought to be reached.

The constitutional issue engendered is fraught with far-reaching consequences. If the Maine court is correct, and if peaceful picketing, whenever it causes economic damage, may be outlawed as an illegal means—because coercive—to achieve an otherwise valid objective, constitutional history in the United States is being remade. More particularly, there is involved a recasting of the mold of decision and reasoning on the subject of peaceful picketing which has been formed during two decades since peaceful picketing was first enveloped within the protective cloak of the Fourteenth Amendment. Surely, such consequences, if they are to be sanctioned at all, should emerge only from the deliberate consideration and decision of this court; they should not result from aloofness, or default, on the part of the supreme constitutional authority of the land. On the other hand, if the Maine court has violated the Fourteenth Amendment, its decision cannot be left undisturbed. The error is a major one and, unless corrected by this court, can lead to widespread restraint of free expression in labor disputes throughout the country.

A substantial federal issue is presented.

II

The decision of the Maine court—that effective peaceful picketing directed at non-union employees at their place of employment to induce them to join the picketers' union, is the necessary legal equivalent of peaceful picketing which is calculated to accomplish the unlawful objective of employer coercion of employees—raises a substantial and important constitutional issue.

Because of the fact alone that effective peaceful picketing by union workers at an employer's premises, aimed at non-union employees to have them join the picketers' union, im-

poses economic damage on the employer, thereby creating the potential that the employer will interfere with his employees in their free choice of bargaining representative, the Maine court, as a matter of law, has equated such peaceful picketing with picketing designed to achieve illegal employer coercion of employees.

In his motion to dismiss this appeal, appellee contends that such decision by the Maine court creates no substantial federal issue. Appellee so argues, (1) in spite of his recognition that peaceful picketing is a manifestation of speech, the free exercise of which is constitutionally guaranteed by the Fourteenth Amendment; and (2) in disregard of the fact, as shown in appellee's Jurisdictional Statement (pp. 13-16), that this court has never sustained an injunction against peaceful picketing because of an alleged improper objective, unless evidence, additional to the item alone of conduct reasonably to be expected as a means of avoiding economic loss, is adduced to establish the improper objective as the *calculated design* of the picketers.

Appellee has not undertaken to support his claim by disputing the accuracy of appellants' analysis of the decisions and reasoning of this court. All that appellee offers is a general statement that

> "it is basic in the many decisions of this court . . . that picketing *can in fact* be designed to cause coercion, interference and restraint upon the decisions and actions of men in violation of law . . . " (*Motion To Dismiss*, pp. 5-6). (Italics ours).

While the truth of this proposition may be conceded, it is obviously irrelevant in the present instance. Here, the crux of the dispute is the deliberate undertaking by the Maine court precisely to dispense with the need for *facts* proving purpose and to establish a necessary equivalence, as a *matter of law*, between any and all "organizational" picketing by union workers of non-union workers at the place of employment and picketing which is calculated to accomplish the unlawful objective of having the employer coerce his employees into joining a union.

That the assertion of such equivalence as a general proposition of law will pose serious constitutional difficulties seems the obvious warning of this court in *Gazzam,* when the court says:

> "there is no contention that picketing directed at employees for organization purposes would be violative of that policy", (pp. 539 and 540).

namely, the policy against coercion, by employers, of workers in their choice of bargaining representative. If no substantial constitutional questions might be deemed to arise from posturing, as does the Maine court, a legal identification between

> "picketing directed at employees for organization purposes"

and picketing calculated to achieve unlawful

> "coercion by the employer of the employees' selection of a bargaining representative",

why was this court so concerned in *Gazzam* to emphasize a distinction of substance and to highlight the fact that the Washington court had promulgated no such equivalence?

The importance of the distinction thus preserved in *Gazzam* and the serious constitutional consequences of obliterating it, as the Maine court has done, are sharply focussed in a recent Missouri decision. In *Bellerive Country Club* vs. *Henry McVey et al,* ..... Mo. ....., 28 C. C. H. Labor Cases, ¶69,278 at p. 89,205 (June 13, 1955) the Missouri court crystalizes the essence of the problem in the following language:

> "The parties agree, and we have held, that peaceful picketing may be enjoined if one of its objectives or purposes is unlawful. [Citation]. The difficulty is that it appears to us that 'organizational' or 'advertising' picketing usually, if not always, has the effect, to some extent, of tending to cause the employer, in order that he may avoid the hardship, loss and inconvenience imposed upon him as the comparatively innocent middleman, to be tempted to persuade his non-union employees to join a union. And where, as in the instant case, the evidence is such as to compel the inference that the picketing union knew or should have known that one effect of the picketing would, as it did, cause an increase in the cost of the club's operation, and would, as it did, result in the club's

inefficient and inconvenient operation, it reasonably may be said that in one sense one of the objectives or purposes of the picketing was to coerce the employer to violate the employees' constitutionally guaranteed right of free and uncoerced choice 'to organize and to bargain collectively through representatives of their own choosing' and thereby was an unlawful objective.

We think, however, that the total problem involved is not so simple of solution. Surely, such an inflexible application of the meaning of Article I, Section 29, Missouri Constitution, 1945, as above suggested, would, in some circumstances, effectively and unconstitutionally deny the right of free speech involved in the right of peaceful picketing. And while we appreciate the fact that picketing is not necessarily the legal equivalent of free speech (*Hughes et al vs. Superior Court of California*, 339 U. S. 460, 465; *International Brotherhood of Teamsters* vs. *Hanke et al*, 339 U. S. 470, 474) and that peaceful picketing under certain circumstances may be enjoined without violating the constitutional guarantee of free speech (*Giboney* vs. *Empire Storage and Ice Co.*, 336 U. S. 490, 93 L. Ed. 834, 69 S. Ct. 684) still the free speech involved as an element of communication in peaceful picketing may not be denied solely because an effect of certain, otherwise permissible, picketing, may be to tend to bring about a violation of a provision of our state constitution.

. . . It would appear, therefore, that a proper interpretation and application of Article I, Section 29, Missouri Constitution, 1945, and the solution of this case calls for a distinction between a 'purpose' or an 'objective' of picketing and the 'effect' of the picketing conducted for a lawful 'purpose'. That is to say that solely because the 'effect' of the picketing in the instant case may have had a *tendency* to cause the employer to violate his employees' constitutional right of free and uncoerced choice, it does not inevitably follow that one of the 'objectives' or 'purposes' of the picketing was unlawful." (p. 89,212).

As we have argued in detail in our Jurisdictional Statement, the various decisions of this court regarding peaceful picketing for an improper objective strongly indicate the correctness of the Missouri court's emphasis on the distinction between "purpose" and "effect" and the need for special evidence, additional to the fact alone of economic loss or its potential consequences, to establish purpose *as a matter of fact*.

It is of the utmost importance in the day to day conduct of labor-management relations and in the administration of labor law that the contrary approach of the Maine court be evaluated, as to its constitutionality, by this court. What is at stake here is nothing less than the very life of the conception that picketing is the working-man's traditional method of speech in labor disputes—the free exercise of which is guaranteed against state infringement by the Fourteenth Amendment. If the attitude of the Maine court is constitutionally sound and a valid precedent to be followed by other state courts, there will be a general tendency throughout the country to outlaw peaceful picketing in any context in which it causes, or has a tendency to impose, economic loss upon those at whom it is directed. The theory would be that any person caught in the "economic vise" (*Motion To Dismiss*, p. 7) which is the natural effect of peaceful picketing at a place of business is being "coerced". On this reasoning, accompanied by the technique of identifying "effect" with "purpose", all peaceful picketing which *causes* economic damage will be regarded as picketing for the *purpose* of accomplishing coercion and intimidation. The scope of such a conclusion, if tolerated, is indicated by the reminder of this court in *Carlson* vs. *California*, 310 U. S. 106 (1940) that

> "such a purpose [damage to the business by loss of patronage or service of suppliers] could be found in the case of nearly every person engaged in publicising the facts in a labor dispute; every employee or member of a union who engaged in such activity at the vicinity of a place of business could be found desirous of accomplishing such objective." (p. 112).

Hence, in almost every labor dispute the scene of which is a place of business, peaceful picketing as a method of publicity in such dispute could be effectively outlawed. Having *caused* "coercion", in the form of economic damage, the peaceful picketing could be said to be *designed to achieve* coercion—if there is, as appellee cavalierly insists, no

> "difference between picketing designed to cause coercion and picketing which . . . causes coercion." (*Motion To Dismiss*, p. 6).

If this be true, the concept that there is meaningful protection in the Fourteenth Amendment for peaceful picketing, conducted as a method of communication in the vicinity of a place of business during the course of a labor dispute, has been eroded to the point of extinction. The potential effects of such a conclusion on labor-management relations in general, and upon the methods of concerted activity traditionally employed in labor disputes throughout the United States, render the matters involved worthy of this court's attention. The United States Supreme Court is called upon to speak on the issues, either

(1) to affirm the decision of the Maine court, and the corollary implicit in it, that, for all practical purposes, the relationship between peaceful picketing and the Fourteenth Amendment is extinguished, or

(2) to declare the constitutional error of the Maine court and thereby proclaim the continuing vitality of the doctrine that peaceful picketing, as the working-man's method of communication, finds significant protection in the Constitution of the United States.

CONCLUSION

Substantial constitutional issues of public importance are here presented and require the consideration and decision of the Supreme Court of the United States.

Respectfully submitted,

SIDNEY W. WERNICK,
Attorney for Appellants.
85 Exchange Street
Portland, Maine

No. 336. STACEY ET AL. *v.* PAPPAS. Appeal from the Supreme Judicial Court of Maine. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS would note probable jurisdiction. *Sidney W. Wernick* for appellants. *Israel Bernstein* for appellee. Reported below: 151 Me. 36, 116 A. 2d 497.